A

Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd

B

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22NCC-1–07 OF 2015
MOHD NAZLAN JC
15 NOVEMBER 2015

C

Civil Procedure — Injunction — Interim injunction — Defendant sought to invoke s 38(1) of the Electricity Supply Act 1990 to disconnect supply of electricity to plaintiff's premises — Whether interim injunction should be granted

D

Public Utilities — Electricity — Disconnection of electricity supply — Defendant found unauthorised interference and tempering of plaintiff's meter — Defendant rectified unauthorised interference — Defendant sought to invoke s 38(1) of the Electricity Supply Act 1990 to disconnect supply of electricity to plaintiff's premises — Plaintiff applied for interim injunction — Interpretation of s 38(1) of the Act — Whether power to discontinue supply could be invoked if offence no longer continuing — Electricity Supply Act 1990 s 38(1)

E

The defendant was the licensee under the Electricity Supply Act 1990 ('the Act') and the provider of electricity in Peninsular Malaysia whereas the plaintiff was the customer of the defendant. Upon inspection of the meter installation at the plaintiff's premises by the defendant's employee, the defendant found that there had been an unauthorised interference and tempering of the said meter. The defendant then served a notice of 'Borang Pemakluman Semakan Pepasangan Meter Elektrik' on the plaintiff and effected the removal and replacement of the tempered meter a new one. However, three months after the date of the discovery of the unauthorised interference, the defendant issued and served on the plaintiff 'Borang A' on 'Notis Pemotongan Bekalan Elektrik di bawah sub-s 38(1) Akta Bekalan Elektrik 1990'. The defendant sought to invoke the statutory power under s 38(1) of the Act to disconnect supply of electricity to the premises of the plaintiff for the reason that the plaintiff had committed an offence under s 37(3)(a), (b), (c) and (e) of the Act. Consequently, the plaintiff brought the present action for an interim injunction to restrain the defendant from disconnecting the supply of electricity to the premises of the plaintiff. The issues for determination were whether the power to discontinue supply could be invoked if the offence was no longer continuing and on the interpretation of s 38(1) of the Act.

F

G

H

I

Held, allowing the application with costs to be in the cause:

(1) The reason why the defendant, a licensee under the Act should be given the statutory power to disconnect electricity supply was quite simply to act swiftly to avoid further illegal usage by the perpetrator continue unabated. It thus necessarily follows by commonsensical deductive logic and elementary legal reasoning that if the said purpose for the exercise of the power to disconnect under s 38(1) of the Act was no longer subsisting and ceased to exist, such power could not lawfully be invoked (see para 22).

(2) The plain and ordinary language of s 38(1) of the Act creates ambiguity because an interpretation disregarding the purpose of s 38(1) of the Act could lead to the situation that despite rectification or replacement of the installation meter has been dishonestly interfered with, TNB may still invoke its power to disconnect electricity supply to the premises of the offending consumer long after the inspection which resulted in the discovery and subsequent rectification. Because of this, the purposive approach would be applicable and come into the picture. Given that the reasons for the power to disconnect as made clear in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217 and *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 would advance the said purpose and not do violence to the plain meaning of s 38(1) of the Act, such interpretation on the true ambit of the power of the defendant to disconnect should thus rightfully be held to be the accurate position in law on the point (see paras 28–29).

(3) Given the court's finding that the defendant did not have the legal authority to disconnect the supply of electricity to the premises of the plaintiff if the offence under s 37(3) was no longer continuing, it would only be appropriate for an unlawful exercise of a statutory power be injuncted and the status quo between the parties be maintained until the disposal of the main suit (see para 39).

[Bahasa Malaysia summary

Defendan adalah pemegang lesen di bawah Akta Bekalan Elektrik 1990 ('Akta') dan pembekal elektrik di Semenanjung Malaysia manakala plaintif adalah pelanggan defendan. Setelah pemasangan meter di premis plaintif oleh pekerja defendan, defendan mendapati bahawa terdapat gangguan yang tidak dibenarkan dan usikan meter tersebut. Defendan kemudian mengeluarkan satu notis 'Borang Pemakluman Semakan Pemasangan Meter Elektrik' kepada plaintif dan melakukan pengalihan dan penggantian meter yang diusik dengan yang baru. Walau bagaimanapun tiga bulan selepas tarikh penemuan gangguan yang tidak dibenarkan itu, defendan mengeluarkan dan menyerahkan kepada plaintif 'Borang A' atas 'Notis Pemotongan Bekalan Elektrik di bawah sub-s 38(1) Akta Bekalan Elektrik 1990'. Defendan memohon untuk menggunakan kuasa statutori di bawah s 37(3)(a), (b), (c) dan (e) Akta. Akibatnya, plaintif membawa tindakan ini untuk injunksi interim untuk

menghalang defendan daripada memutuskan bekalan elektrik di premis plaintif. Isu untuk penentuan adalah sama ada kuasa untuk memutuskan bekalan boleh digunakan jika kesalahan tidak lagi berterusan dan terhadap tafsiran s 38(1) Akta.

Diputuskan, membenarkan permohonan dengan kos di dalam kausa:

(1) Alasan mengapa defendan, pemegang lesen di bawah Akta sepatutnya diberikan kuasa statutori untuk memutuskan bekalan elektrik cukup hanya untuk bertindak cepat untuk mencegah penggunaan haram lebih lanjut oleh pelaku terus berlanjutan. Ia dengan itu, semestinya dengan deduktif logik munsabah dan hujah undang-undang asas bahawa jika tujuan tersebut untuk melaksanakan kuasa bagi memutuskan sambungan di bawah s 38(1) Akta tidak lagi wujud dan berhenti untuk wujud, kuasa itu tidak boleh secara sah digunakan (lihat perenggan 22).

(2) Bahasa yang jelas dan biasa s 38(1) Akta menimbulkan kesamaran, kerana satu tafsiran yang mengabaikan tujuan s 38(1) Akta, boleh membawa kepada situasi sebegitu, walaupun pembetulan atau penggantian meter pemasangan telah secara tidak jujur diusik, TNB masih boleh menggunakan kuasanya untuk memutuskan bekalan elektrik di premis pengguna yang bersalah lama selepas pemeriksaan, yang mana menyebabkan kepada penemuan dan pembetulan selanjutnya. Disebabkan oleh ini, pendekatan bertujuan akan digunakan dalam kes ini. Memandangkan bahawa alasan untuk kuasa diputuskan seperti yang dinyatakan dengan jelas dalam kes *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217 dan *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 akan mendorong tujuan tersebut dan tidak akan merosakkan makna yang jelas s 38(1) Akta, tafsiran sebegitu pada bidang kuasa sebenar defendan untuk memutuskan sambungan, seharusnya berhak diputuskan menjadi keputusan yang tepat dalam undang-undang berkaitan hal ini (lihat perenggan 28–29).

(3) Memandangkan dapatan mahkamah bahawa defendan tidak mempunyai kuasa yang sah untuk memutuskan bekalan elektrik di premis plaintif jika kesalahan di bawah s 37(3) tidak lagi berterusan, ia hanya akan menjadi wajar untuk pelaksanaan kuasa statutori yang tidak sah itu, ditegah, dan *status quo* antara pihak-pihak dikekalkan sehingga kes saman utama diselesaikan (lihat perenggan 39).]

Notes

For cases on disconnection of electricity supply, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2356–2357.

For cases on interim injunction, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 4026–4154.

Cases referred to

Adil Juta Sdn Bhd v Tenaga Nasional Bhd [2015] 9 MLJ 379; [2014] 1 LNS 1022, HC (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (folld)

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449; [2013] 1 CLJ 24, FC (refd)

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd [2014] 6 MLJ 461, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Mayaria Sdn Bhd & Anor v Tenaga Nasional Bhd [2015] MLJU 276; [2015] 6 CLJ 788, HC (folld)

Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd [2015] 3 CLJ 825, HC (folld)

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, CA (refd)

Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd [2014] MLJU 1813; [2014] 4 CLJ 323, CA (refd)

Tan Yeong Kim lwn Tenaga Nasional Bhd [2000] MLJU 447; [2000] 8 CLJ 629, HC (refd)

Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990) [2010] 2 MLJ 155; [2010] 2 CLJ 1, FC (folld)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Electricity Act 1989 [UK] Schedule 7 , Para 11

Electricity Supply Act 1990 ss 37, 37(3), 37(3)(a), (3)(b), (3)(c), (3)(e), 38, 38(1), (2), (3)

Interpretation Acts 1948 and 1967 s 17A

Licensee Supply Regulations 1990 Form A

Abd Rahim bin Ali (Rahim, Aidil & Partners) for the plaintiff.

Izatunlina bt Jamaludin (Shahrizat Rashid & Lee) for the defendant.

Mohd Nazlan JC:

INTRODUCTION

[1] This is an application for an interim injunction to restrain Tenaga Nasional Bhd ('TNB') from disconnecting the supply of electricity to the premises of the plaintiff. This judgment discusses the law on the statutory authority of TNB to disconnect electricity supply to the premises of a consumer following discovery of meter tampering which is subsequently remedied.

KEY BACKGROUND FACTS

[2] TNB is a licensee under the Electricity Supply Act 1990 ('the ES Act') and the provider of electricity in Peninsular Malaysia. The plaintiff is a customer of TNB, as evidenced by the standard contract for the supply of electricity between both parties and in accordance with the provisions of the ES Act, pursuant to which electricity is supplied to the industrial premises of the plaintiff which is averred by the plaintiff to be running an ice production factory situated at Lot 1506, Batu 15 1/2, Jalan Sungai Tiram, 81800 Ulu Tiram, Johor.

[3] On 9 April 2015, employees of TNB performed an inspection of the meter installation at the premises of the plaintiff, and concluded that there had been an unauthorised interference and tampering of the said meter installation. A notice of Borang Pemakluman Semakan Pepasangan Meter Elektrik was then served on the plaintiff, the contents of which relevantly included the following:

> Hasil pengujian menunjukkan meter berkenaan tidak merekodkan penggunaan elektrik yang sebenar dan ini telah diterangkan kepada tuan (didapati wayar S1 dan S2 arus pendua pada fasa kuning telah diterbalikkan (twist) di terminal meter main).

The meter tampering, according to TNB, thus meant that the meter could not and therefore did not during the material time correctly record the actual utilisation of electricity by the plaintiff as supplied by TNB.

[4] Although not averred by the representative of TNB in the affidavit in reply, the counsel for the plaintiff submitted (and this was not disputed by the counsel for TNB) that in accordance with the standard operating procedure of TNB governing the situation which then prevailed and unfolded, and which resulted in the finding of unauthorised interference of the meter, the TNB had upon such discovery on the same day effected the removal and replacement of the tampered meter with a new one, or otherwise undertaken the requisite rectification works to address the unauthorised interference and have a properly functioning meter installed. The issue of the meter tampering having

been addressed, TNB thereafter continued providing the supply of electricity to the plaintiff and accordingly billed the latter for its present usage of electricity as what can be considered as being accurately recorded by the meter post-rectification.

[5] On 30 June 2015, almost three months after the date of the discovery of the unauthorised interference (and rectification thereof), TNB issued and served on the plaintiff the requisite Borang A on 'Notis pemotongan bekalan elektrik di bawah sub-s 38(1) Akta Bekalan Elektrik 1990'. For present purposes, the relevant parts of the Notice Borang A are reproduced below:

> Sila ambil perhatian bahawa pada 9 April 2015/12 tengah hari (tarikh/masa) satu pemeriksaan telah dilakukan terhadap pepasangan kami di premis tuan. Hasil pemeriksaan, kami mendapati bahawa pepasangan tersebut telah diusik atau diubahsuai dalam keadaan yang dinyatakan berikut di bawah:
>
> (1) Didapati wayar arus pendua S1 dan S2 bagi fasa kuning telah diterbalikkan di terminal meter.
>
> (nyatakan modus operandi kesalahan)
>
> Berdasarkan keterangan di atas, pihak kami berpendapat bahawa suatu kesalahan telah dilakukan di bawah Akta Bekalan Elektrik 1990 (Akta) seperti berikut:
>
> ...
>
> Subseksyen 37(3)
>
> — Mengikut apa-apa cara yang curang:
>
> (a) mengambil tenaga;
>
> (b) mengguna habis tenaga;
>
> (c) mengguna tenaga;
>
> (d) ...
>
> (e) menghalang apa-apa meter atau alat sedemikian daripada merekodkan dengan sempurnanya keluaran atau penggunahabisan tenaga;
>
> (f) ...
>
> Sila ambil perhatian bahawa di bawah Subseksyen 38(1) Akta, tuan adalah diberi notis bahawa bekalan elektrik di premis seperti di atas akan dipotong pada 1 Julai 2015.
>
> Sila ambil perhatian kami akan membuat tuntutan apa-apa kerugian dan perbelanjaan oleh pihak kami berikutan kesalahan yang dilakukan seperti di atas. Pihak kami akan mengemukakan pernyataan tuntutan kepada tuan dalam masa terdekat.
>
> ...

[6] Thus, TNB sought to invoke the statutory power under s 38(1) to disconnect supply of electricity to the premises of the plaintiff upon the former forming the opinion that an offence under s 37(3)(a), (b), (c) and (e) had been committed, by the giving of the said Borang A notice not less than 24 hours before the intended time (and date) for disconnection.

[7] The plaintiff then swiftly moved to obtain an ex parte injunction literally several minutes before quarter to one on 1 July 2015, the time and date for the supply to be discontinued, as specified by TNB in Borang A, in accordance with s 38(1) of the ES Act. As such, TNB was prevented from disconnecting the electricity supply to the plaintiff. The application was fixed for inter partes hearing on 14 July 2015 but since then the injunction had been extended on an ad interim basis pending disposal of the inter partes application for the injunction. The hearing took place on 6 August 2015, and following an attempt to give time for parties to try settle the matter, which turned out to be unsuccessful, I granted the injunction as per encl 5 on 24 August 2015.

CONTENTIONS FOR AND AGAINST INJUNCTION

[8] At the inter partes hearing, the plaintiff advanced a number of grounds to support its application for injunction, none of which but one deserved further evaluation for being clearly untenable and without merit. The one worthy of a more focused consideration is concerning the crux of this judgment which is on the exercise of TNB's statutory power of disconnecting supply under s 38(1). For completeness however, I should briefly mention the other contentions; if only to be summarily dealt with. The plaintiff argued that the requisite Borang A notice was not served on the plaintiff but instead on a different, albeit related corporation, based on the acknowledgement stamped on the form which did not bear the name of the plaintiff. Further it was also contended that the requisite minimum 24 hour notice was not adhered to by TNB. The plaintiff also contended that the affidavit deposed by Arizal bin Ashari, Jurutera Kanan with TNB contained nothing but hearsay since he was not the employee who conducted the inspection which discovered the unauthorised interference of the installation meter at the premises of the plaintiff.

[9] I agreed with the submission by the counsel for TNB that these contentions are plainly misconceived if not disingenuous at the same time. The related corporation on which the Borang A notice was said to have been served is Xin Guang Corp Sdn Bhd which has a similar composition of the board of directors with that of the plaintiff. Most significantly, Aw Kwan Wah, a manager of the plaintiff who affirmed the various affidavits for the plaintiff is the single largest registered shareholder for both the plaintiff and Xin Guang Corp Sdn Bhd. He is also a common director on the boards of both. Equally

pertinent is the fact that the two entities share the same business address as well as registered address. The objection by the plaintiff on this ground is therefore baseless, as is the other argument that TNB did not comply with the 24 hour notice requirement. This is manifestly devoid of merit because the 24 hour period had not yet lapsed at the time of the hearing. There was no basis to speculate that TNB would effect the disconnection in breach of s 38(1) since TNB had clearly specified the minimum 24 hour notice in the requisite Borang A notice. In addition, I did not find anything irregular, let alone defective in the affidavits affirmed by the employee of TNB (Arizal bin Ashari) since at this stage of the proceedings it is quite sufficient and certainly not objectionable for the making of the averments which are also expressly stated therein as being based on facts, knowledge and records of the matter in respect of which the deponent has access and is privy to.

THE CENTRAL ISSUE ON THE POWER TO DISCONNECT UNDER S 38(1)

[10] The most substantive argument preferred by the plaintiff however is purely a legal one. That is on the interpretation of s 38(1) of the ES Act concerning the power of TNB to effect disconnection of electricity supply. Section 38(1) provides as follows:

> 38 Disconnection of supply of electricity
>
> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37 (1), 37 (3) or 37 (14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[11] As stated earlier, the requisite Borang A notice made reference to the statement by TNB therein that an offence had been committed under s 37(3) of the ES Act. The relevant provision reads as follows:

> (3) Any person who in any manner dishonestly —
>
> (a) abstracts electricity;
>
> (b) consumes electricity;
>
> (c) uses electricity;
>
> (d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or
>
> (e) prevents any such meter or instrument from duly recording the output or consumption

shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[12] The contention advanced by the counsel for TNB is straight forward. She submitted that the requirements of s 38(1) have all been fully satisfied and therefore the intended exercise of TNB's power to disconnect is entirely proper and plainly justified. The ingredients of the statutory provisions have all been fulfilled. First, the Borang Pemakluman Semakan Pepasangan Meter Elektrik oleh TNB (as exhibited to the affidavit of Arizal bin Ashari for TNB) shows that an employee of TNB, Azmanizam bin Sarip who is referred to as 'Juruteknik T/Biasa, Seksyen Jaminan Hasil (SJH), Zon Selatan Bhgn Pembahagian, TNB' signed off as the examiner who inspected the meter installation at the premises of the plaintiff. Secondly, the same examiner stated in the said Borang that the meter as inspected did not record the actual utilisation because of the switching of the S1 and S2 connection wires. The relevant pictures were also exhibited. Borang A issued by TNB then stated that as a result, an offence under s 37(3) had thus been committed. Thirdly the said Borang A, as stated earlier also specified the intention to disconnect a day after service of the Borang A.

[13] The counsel for TNB therefore argued that TNB should not be prevented from exercising its statutory power to discontinue the supply given their adherence to the requirements of s 38(1) of the ES Act. Further, it is also well settled that the offence which in the opinion of TNB had been committed by the plaintiff in light of the unauthorised interference need not be proven nor for a conviction be recorded by the court as a pre-requisite to TNB invoking the authority to disconnect. The Court of Appeal's decisions in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892 and *Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd* [2014] 6 MLJ 461 made it manifest that s 38(1) does not require evidence of conviction or a guilty finding by the court for the said commission of offences. The Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 further ruled as follows:

(6) Section 38 of the Act empowers the respondent to discontinue electricity supply based on the subjective finding of its employee if any offence has been found committed under ss 37(1), 37(3) or 37(14) of the Act. The respondent had clearly complied with all the necessary statutory requirements where it had served the appellant not only with the letter but also the two documents, which were necessary pre-requisites under the Act. In the event if the respondent was later found to have breached its obligation under the contract or its statutory obligation, the appellant may file an action against the respondent. Hence, the appellant was not without a remedy (para 25).

PURPOSE OF S 38(1) IS TO PREVENT THEFT AND FURTHER LOSS

[14] The plaintiff however contended that there is no lawful basis for TNB to invoke its powers under s 38(1) of the ES Act since the rectification works performed on the day of the discovery of the meter tampering must have meant that the unauthorised interference had been discontinued and thus any further presumed loss of electricity ceased to be an issue. Coupled with the equally significant fact that neither had TNB made any demand for any back charges, it is the case of the plaintiff that the discretionary power conferred on TNB by s 38(1) must be exercised fairly, as the rationale for the statutory provision is to prevent parties, especially TNB from suffering continued loss from the commission of the offence under s 37(3) of the ES Act. In the instant case, such loss from any alleged unlawful interference with the installation meter had ceased to persist on the inspection day of 9 April 2015 itself. The contention put forth by the counsel for the plaintiff is exactly the same as the one raised by another consumer of TNB, which prevailed and was upheld by the High Court in *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825.

[15] The facts in *Modernria* are similar to those in the instant case. The tampered meter was remedied on the same day of inspection. The Borang A notice to disconnect was however still issued to the customer, about two and a half months later (in the instant case, close to three months after, as referred to earlier), and TNB had also not issued any notice of demand for any back charges. After having reviewed the relevant case law authorities on the subject, the learned judicial commissioner ruled that the absence of any perpetration or continuation of an offence under s 37(3) of the EA Act disentitles TNB under the law from invoking its powers under s 38(1) to disconnect electricity supply to the premises of its consumers.

[16] It is critical to appreciate that the decision in *Modernria* is primarily based on the reason for the promulgation of s 38(1) conferring on TNB the power to disconnect as expressed by the Court of Appeal in *Claybricks* and by the Federal Court in *WRP Asia Pacific*. A careful review of these cases of high authority would readily reveal that the very issue to be determined in the instant case, as was the case in *Modernria* (that is, whether the power to discontinue supply can be invoked if the offence is no longer continuing) was however not specifically considered. Thus the conclusion in both cases of *Claybricks* and *WRP Asia Pacific* is also to be considered in the context of the different focus of the issues; in that TNB does have the power to disconnect notwithstanding that a conviction for an offence under s 37(3) of the ES Act has not been recorded (*Claybricks*) and that such a decision to exercise that power by TNB, a corporate entity, is not susceptible to judicial review process

(*WRP Asia Pacific*). Yet in both, the purpose and reason for s 38(1) could not have been expressed in clearer terms.

[17] In *Claybricks,* Zulkefli Ahmad Makinudin JCA (as His Lordship then was) delivering the decision of the Court of Appeal most instructively ruled the following:

> [8] Kami perlu menyatakan di sini bahawa peruntukan s 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan samada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksyen tersebut boleh diambil. Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s 38(1) dapat digunakan. Kami berpendapat s 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan *TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB*. Jika badan perundangan berniat bahawa pembuktian kesalahan melalui mahkamah diperlukan sebelum kuasa di bawah s 38(1) Akta tersebut dapat digunakan, maka peruntukan yang jelas harus dibuat mengenainya. Bagaimanapun tiada peruntukan seperti itu dibuat. Adalah pandangan kami tafsiran yang cuba diketengahkan oleh peguam perayu tidak dapat diterima kerana jika mahkamah ini berbuat demikian dengan memasukkan perkataannya sendiri untuk dipakai ke dalam Akta, ianya adalah bertentangan sama sekali dengan segala prinsip pentafsiran statut. (Emphasis added.)

[18] In *WRP Asia Pacific,* Suriyadi Halim Omar FCJ, delivering the judgment of the Federal Court held no less plainly as follows:

> [7] At the Court of Appeal the appellant's appeal was dismissed on the ground that the relationship between the appellant and the respondent was purely commercial or contractual. As the relationship came within an environment regulated by private law it was not open to the appellant to challenge the respondent's decision by judicial review, which was a public law remedy. In dismissing the appellant's appeal, the Court of Appeal relied on *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892. This case relates to an Erinford injunction application to prevent the TNB from disconnecting the supply of electricity to the plaintiff's premises. Zulkefli Ahmad Makinudin JCA (as he was then) when dismissing the appeal remarked:
>
> > TNB's s 38 notice to disconnect the electricity supply for offences enumerated in s 37 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.
>
> [8] Zulkefli Ahmad Makinudin JCA also elaborated that s 38(1) of the Act was enacted to give effective powers to TNB *to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby*

preventing misuse such as theft of electricity supplied by TNB. (Emphasis added.)

[19] Thus, given the aforesaid purpose of s 38(1), *Modernria* was decided on the basis that the rationale no longer existed when the power to disconnect was sought to be exercised by TNB. I shall not attempt to do any better than reproduce the relevant passages in the judgment of the learned judicial commissioner in *Modernria* on this point, as follows:

> [28] In my view, if the offence is continuing, then quite clearly the power under s 38(1) of the Act can be invoked at any time, regardless of whether it is urgent or not and regardless of whether TNB has proven in criminal proceedings that an offence has been committed. But the situation that presents itself in this case is different. In the present case, the offence under s 37(1) of the Act is a past offence and not one which is continuing. Here, TNB has admitted that the meter was replaced on 6 June 2014. Also, there is no suggestion of any tampering of the meter since that date. As such, I must proceed on the basis that there has been no tampering after 6 June 2014 and the position since that date is that the amount of electricity consumed at the said premises is being correctly recorded. Hence, this brings me back to the question as to whether TNB may subsequently invoke the power to disconnect under s 38(1) of the Act in circumstances where there is no longer any tampering or theft of electricity.
>
> [29] *In this regard it is clear from the judgment of the Court of Appeal in Claybricks and the judgment of the Federal Court in WRP Asia Pacific that the power under* s 38(1) *of the Act is necessary to ensure that TNB is able to immediately severe electricity supply to avoid further illegal usage by the perpetrator. Quite clearly on the facts of the present case, there is no longer any illegal usage by the consumer such as to warrant the invoking of the power to disconnect under* s 38(1) *of the Act. …* (Emphasis added.)

[20] The learned judicial commissioner reaffirmed his decision on the very same issue in a subsequent case of *Mayaria Sdn Bhd & Anor v Tenaga Nasional Bhd* [2015] MLJU 276; [2015] 6 CLJ 788, and additionally ruled, given the facts of that case, that there is nothing in the statutory provisions that permit TNB to invoke the powers to disconnect supply under s 38(1) as a means to demand for payment of the amount which constitutes loss of revenue, which ought properly to be pursued by way of the ordinary civil action of recovery. It is to be recalled that in *Modernria*, as is in the instant case, but unlike in *Mayaria* (or in *Claybricks* and *WRP Asia Pacific* for that matter), there was no demand for any back payment or loss of revenue, at least not at any time when the Borang A Notice to disconnect electricity supply was issued.

STATUTORY CONSTRUCTION OF S 38(1)

Purposive interpretation

[21] More significantly, *Mayaria* discussed the issue of the correct construction to be ascribed to s 38(1) of the ES Act, which is whether to favour

a plain and literal meaning of s 38(1) as similarly contended by the counsel for TNB in the instant case, or an interpretation that effectively reads into s 38(1) the purpose of the provision as expressed in *Claybricks* and *WRP Asia Pacific,* and as contended by the plaintiff herein. *Mayaria* categorically favours the latter, as made clear in the following parts of the judgment:

> [88] I am of the view that the interpretation rendered by the courts in *Claybricks* and *WRP Asia* as to the purpose of the power in s 38(1) of the Act is completely in tandem with the objective of that section which is to enable TNB to swiftly curb an offence which is continuing or which is still extant. The key issue here is whether the power to disconnect can be exercised by TNB when the offence has already abated due to TNB's own standard procedure of replacing the tampered meter with the new meter. I had previously answered this issue in the negative and had given my reasons in *Modernria* for arriving at such a conclusion. I find nothing in the arguments presented in this case which impels me to take a different view. Hence, I am maintaining the view that I had taken in *Modernria* ...

[22] I am in agreement with the approach adopted in *Modernria* and *Mayaria* on the construction of s 38(1) of the ES Act, the basis being the judicial pronouncement made by the Court of Appeal in *Claybricks* and by the Federal Court in *WRP Asia Pacific* as to the reason why TNB, a licensee under the ES Act should be given the statutory power to disconnect electricity supply. Which is quite simply to act swiftly to avoid further illegal usage by the perpetrator continue unabated. It thus necessarily follows by commonsensical deductive logic and elementary legal reasoning that if the said purpose for the exercise of the power to disconnect under s 38(1) is no longer subsisting and ceases to exist, such power cannot lawfully be invoked.

The relevant English provision

[23] A quick research on the provisions of the UK Electricity Act 1989 further reinforces the pronouncements in *Claybricks* and *WRP Asia Pacific*, and may well offer an even more complete answer to the question of the purpose of s 38(1) and particularly on the issue whether the power is exercisable in the absence of a continuing offence. In brief, the relevant statutory provision (not highlighted in either *Modernria* or *Mayaria*), provides to the effect that the similar power to discontinue electricity supply due to meter tampering can be invoked for as long as the interference has not been remedied. Paragraph 11 of Sch 7 to the Electricity Act 1989 provides as follows:

> 11 Interference with meters
>
> (1) If any person intentionally or by culpable negligence —
>
> (a) alters the register of any meter used for measuring the quantity of electricity supplied to any premises by an authorised supplier; or
>
> (b) prevents any such meter from duly registering the quantity of

A electricity supplied,
he shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(2) Where any person is prosecuted for an offence under sub-paragraph (1) above, the possession by him of artificial means for causing an alteration of the register of the meter or, as the case may be, the prevention of the meter from duly registering shall, if the meter was in his custody or under his control, be prima facie evidence (or in Scotland sufficient evidence) that the alteration or prevention was intentionally caused by him.

(3) Where an offence under sub-paragraph (1) above has been committed, the supplier *may discontinue the supply of electricity to the premises until the matter has been remedied and remove the meter in respect of which the offence was committed.*

(4) Where an authorised supplier removes a meter under sub-paragraph (3) above, he shall keep it safely until the Director authorises him to destroy or otherwise dispose of it. (Emphasis added.)

[24] This provision thus states that the disconnection may be effected only until the tampered meter has been remedied or removed, and clearly supports the specific point of the important position taken in *Modernia* and *Mayaria,* which is that if the offending meter has been remedied, and further loss of revenue ceased, the statutory power given to TNB can no longer be lawfully exercised from the point of the completion of the remedial work. Further, in my view, there can be no concession to the familiar argument that since s 38(1) of the ES Act does not actually contain similar words, the section must be taken not to be qualified by such purpose. This is because the relevant UK provision does not militate against and is instead fully in consonance with the essence of the pronouncements on the reasons for s 38(1) as expressed by the Court of Appeal and the Federal Court in *Claybricks* and *WRP Asia Pacific*, respectively.

View that purposive interpretation only allowed if there is doubt in plain meaning

[25] Although the issue of the correct interpretation to be given to s 38(1) of the ES Act vis a vis the principles of statutory interpretation and the true applicability of s 17A of the Interpretation Acts 1948 and 1967 was not argued before me in the instant case, in my evaluation, although there seems to be a divergence of judicial view as to whether the purposive interpretation (even in light of the said s 17A) can be resorted to when there is no ambiguity, with *Mayaria* settling for the latter (on the authority of the Federal Court case of *Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang — which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990)* [2010] 2 MLJ 155; [2010] 2 CLJ 1), s 17A itself, ironically, if read literally, to my mind suggests quite manifestly that the purposive interpretation is

invariably always the preferred choice in all cases. Notwithstanding, I am bound by the decision of the Federal Court in *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449; [2013] 1 CLJ 24 which no less palpably, enunciated the opposite position on the interpretative process involving s 17A of the Interpretation Acts 1948 and 1967. It is important that I reproduce the relevant parts of the judgment of Zulkefli Ahmad Makinudin CJ (Malaya) as follows:

[18] Section 17A of the Interpretation Act provides that:

> A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97; [2006] 4 CLJ 195 wherein this court had laid down the principles, inter alia, as follows:

In summarising the principles governing the application of the purposive approach to interpretation, Craies on *Legislation* (8th Ed) says at p 566:

(1) Legislation is always to be understood first in accordance with its plain meaning.

(2) Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

(3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

(5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

The choice prescribed in s 17A of '... a construction that would promote the purpose or object underlying the Act... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. *Thus, it is only when a provision is capable of bearing two or more different meanings can* section 17A *be resorted to in order to determine the one that will promote the purpose or object of the provision*. Such an

exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s 17A. (Emphasis added.)

There is doubt and ambiguity in plain reading of s 38(1)

[26] It is my view that the proposition of law that under s 38(1) of the ES Act, TNB can only lawfully disconnect when the offence is still continuing and conversely cannot if it has since ceased is premised not merely on the justification that the law permits recourse to the purposive interpretation of statute when there is no ambiguity, a position taken in *Mayaria,* but that even by a strict application of the principles endorsed by the Federal Court in *Andrew Lee Siew Ling,* there is, in my judgment already doubt and ambiguity in the plain and literal meaning of the language of s 38(1) to start with, thus in turn readily permitting the initiation of the interpretative process of attempting to discover the broad purpose of the ES Act.

[27] It cannot therefore be wholly accepted that previous judicial pronouncements such as in *Claybricks* and *Tan Yeong Kim lwn Tenaga Nasional Bhd* [2000] MLJU 447; [2000] 8 CLJ 629 that suggested that s 38(1) is clear and unambiguous can be considered a settled position, not least because the specific question to be answered in the instant case was only truly and pointedly first considered in *Modernria*. In other words, a true reading of the provisions of s 38(1) of the ES Act cannot be argued to proscribe a construction other than its literal and ordinary meaning. The legal analysis in *Mayaria* is premised on the basis that even if the literal and ordinary meaning of s 38(1) is free from doubt and ambiguity this does not prevent the application of the purposive approach to construction. Whilst I agree with this stance, I would venture to suggest that there are issues with the plain meaning of s 38(1) to start with.

[28] In my view, it can be justifiably argued that the plain and ordinary language of s 38(1) does indeed give rise to a degree of doubt and is therefore not unambiguous. Because of this, the purposive approach would be applicable and come into the picture, in line with the test endorsed by the Federal Court in *Andrew Lee Siew Ling.* Given that the reasons for the power to disconnect as made clear in *Claybricks* and *WRP Asia Pacific* would advance the said purpose and not do violence to the plain meaning of s 38(1), such interpretation on the true ambit of the power of TNB to disconnect should thus rightfully be held to be the accurate position in law on the point.

[29] I say that the plain and ordinary meaning of s 38(1) creates ambiguity for the following reasons. An interpretation disregarding the purpose of s 38(1)

as clearly articulated in *Claybricks* and *WRP Asia Pacific* could lead to the situation that despite rectification or replacement of the installation meter that has been dishonestly interfered with (and there is no recurrence of tampering), TNB may still invoke its power to disconnect electricity supply to the premises of the offending consumer long after the inspection which resulted in the discovery and subsequent rectification. It may even take years and not a just couple of months like in the instant case. This eventuality could not be described other than as being potentially unreasonable, if not patently absurd, and thus rendering the literal and ordinary meaning of s 38(1) in doubt and ambiguous.

[30] It is not in dispute that the scheme of s 38 of the ES Act does not make either the power to disconnect under sub-s (1) or the right to claim loss of revenue under sub-s (3), both of which may be exercised by TNB following the formation of its subjective opinion on the commission of an offence under s 37, to be a *sine qua non* of one another. As such TNB may choose to sever supply even if there is never any intention to claim back charges for the loss of revenue as a consequence of the unauthorised interference. Equally not beyond contemplation (but may not necessarily be well appreciated) is a situation where the disconnection is effected even after payment for loss of revenue has been fully settled by the relevant consumer, and any issue of meter tampering completely resolved.

[31] Further, it can now be fairly said to be settled law as made abundantly clear in cases such as *Claybricks* and *WRP Asia Pacific* that it is not a prerequisite for the exercise of the power to disconnect electricity supply that a conviction for the offence that leads to the disconnection must first be secured. This means that TNB may proceed to invoke its powers under s 38(1) even before an offence is proven in a court of law or irrespective of whether or not any criminal charge is to be preferred. In the instant case there is no evidence to suggest that the finding of the meter tampering said to be perpetuated by the plaintiff is anywhere close to a criminal prosecution, if at all. Yet it is plain and no one is under any illusion that the power to disconnect supply is never enacted with a view to punishing for meter tampering or electricity theft because such course of action should be pursued in accordance with the provisions in the ES Act on criminal proceedings.

[32] In addition, the provisions of s 38 themselves make it manifest that the power to disconnect supply to the premises of consumers in cases such as meter tampering is both immediate and interim in nature. The element of immediacy is apparent in the requirement to give 24 hour notice before such power is to be exercised under sub-s (1). That the disconnection is also intended to be temporary is crystal clearly stated in sub-s (2) which provides that the period of disconnection shall not exceed three months.

[33] Thus, as an example, a literal reading of s 38(1) could lead to an unintended scenario that because of the commission of an offence due to one incident of tampering which, say resulted in minimal loss (or entirely negligible), TNB could still rely on the said provision to disconnect supply a number of years later, and even though the seriousness of the interference or the extent of the loss of revenue made TNB and the public prosecutor decide not to claim back charges or prosecute for the commission of an offence under s 37(3), respectively. In view of such permutations, it could not have been intended by the Legislature that TNB be conferred the power to disconnect electricity supply without recognising the qualification that such power is rightfully capable of being lawfully exercised only for as long as the offence continues to be committed. It should also not be overlooked and must be emphasised that under s 38(1) TNB has the power but not the duty to disconnect.

[34] The possible argument that TNB would in practical terms not be able to exercise its powers under s 38(1) since as a matter of procedure TNB would upon discovery of any untoward interference, invariably effect remedial work to end the tampering is in my view not tenable since the overriding consideration must always be whether the reason to disconnect exists. If the offence is no longer extant there is no good reason why TNB should insist on the severance of supply. In that sense, the argument that the power to disconnect is effectively superfluous is not a compelling one, if valid in the first place. Every statutory power is created for a purpose. If the purpose is not established, the notion that the exercise of such power is not authorised is thus neither flawed nor illogical. But action should obviously be considered to be taken against the consumer in default for any civil and criminal liability under the full force of the law. And this is unrelated to considerations for the exercise of severance of supply.

[35] Further, there may be situations where having discovered tampering, TNB is for some reasons prevented from undertaking the remedial works or meter replacement at the premises of the consumer resulting in further and uninterrupted loss of electricity. In such event, having formed the subjective opinion that an offence has been committed, TNB may clearly justifiably at that point seek to invoke the powers to disconnect the supply to the said premises.

[36] In situations where TNB considers that the derelict consumers engage in non-permanent tampering, as highlighted in *Mayaria* in cases such as *Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd* [2014] MLJU 1813; [2014] 4 CLJ 323 and *Adil Juta Sdn Bhd v Tenaga Nasional Bhd* [2015] 9 MLJ 379; [2014] 1 LNS 1022, the argument seems to be that as the consumers could remove evidence of their interference or tampering and effected normalisation

of meter reading themselves, TNB is thus prevented from exercising its power to sever supply since the offence is no longer being perpetuated. I do not think that this argument is necessarily valid. If the interference is temporary in nature but susceptible to being easily repeated by the miscreant consumer, it may not be out of place for TNB, in forming its opinion under s 38(1) as to whether an offence has been committed under s 37(3), to consider concluding on the facts (where recurrence is likely) that the perpetuation of the offence has not ceased. In such event, as continual loss and pilferages has not wholly abated, TNB certainly still retains the ability to invoke s 38(1) to initiate supply disconnection.

Exercise of statutory power must consider purpose

[37] In any event, there is in my view another basis (implicit in earlier parts of this judgment) that justifies an interpretation of s 38(1) of the ES Act that considers the purpose established by *Claybricks* and *WRP Asia Pacific*. It should not be overlooked that the central issue being determined concerns not just a question of the correct interpretation to be given to a statutory provision, but more significantly, the said provision relates to the exercise of a statutory power. An entrenched principle of administrative law regulating the exercise of discretionary power, such as that conferred on TNB in s 38(1) is that discretion must be used for the purpose it is intended. In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, Lord Reid stated clearly as follows:

> Parliament must have *conferred the discretion with the intention that it should be used to promote the policy and objects of the Act*, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. (Emphasis added.)

Accordingly, when a legislation involves the granting of a discretionary power, it should invariably be the case that the purpose of the statute must be taken into account to ensure there is no exercise in excess of jurisdiction, perhaps more so when the power is conferred on a non-public or administrative body. Thus, even if it could be said that the language of s 38(1) is plain and not ambiguous (which I am inclined to disagree) the purpose of s 38(1) must still be ascertained. Since this has been well-explained in *Claybricks* and *WRP Asia Pacific*, any exercise of s 38(1) of the ES Act must thus without fail be made to be fully consistent with the remit of such purpose.

[38] Counsel for the plaintiff suggested during the hearing that s 38(1) of the ES Act should be amended. I agree that this is certainly worthy of serious consideration, for it is basic that TNB as a corporate entity licensee vested with the statutory power under s 38(1) deserves the requisite legal certainty to strategise effectively in its efforts to combat the scourge of theft of electricity and prevent loss of revenue, in the enforcement of its contractual rights against

consumers in default. *Mayaria* too proposed legislative amendment to s 38(1), emphasising the truism however that the difficulties in detecting and preventing theft cannot be the basis for interpreting s 38(1) in a fashion that suits the operational needs of the TNB. Thus, in my view, as an example, regard may be had to the relevant English statutory provision in the Electricity Act 1989 I referred to earlier in efforts to provide greater legislative clarity.

ASSESSMENT ON APPLICATION FOR INJUNCTION

[39] Reverting to the application by the plaintiff for an injunction to restrain TNB from exercising its powers to disconnect the supply of electricity to the premises of the plaintiff, given my finding that TNB does not have the legal authority to do so if the offence under s 37(3) is no longer continuing (which is assumed to be the case in the instant proceedings) it would only be appropriate for an unlawful exercise of a statutory power be injuncted and the status quo between the parties be maintained until the disposal of the main suit. Even if the position is that the issue of interpretation is not settled, applying the principles first pronounced in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 as endorsed by the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 and the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 the same is certainly sufficiently worthy to be considered as a bona fide serious question to be tried. On the consideration of the balance of convenience, guided by the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice, the balance of justice, in my view lies in granting the injunction, given the financial and economic loss and other irreparable harm that may occasion the industrial plant operated by the plaintiff if electricity is to be disconnected. On the other hand, an injunction would not result in any discernible harm to TNB, especially since the tampered meter had been remedied and there is no continuation of loss of revenue. There are additionally no other considerations of a discretionary nature that would justify my refusing the grant of the injunction.

CONCLUSION

[40] Accordingly, in conclusion, in light of the foregoing grounds, I allowed the plaintiff's application in terms of encl 5, which injunction is to continue until the disposal of the main action. I also ordered costs to be in the cause.

Application allowed with costs to be in the cause.

Reported by Dzulqarnain Ab Fatar